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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

Bernard Harrison, Hinda Lapkoff,
Edith Adler, and Florence Herman, Petitioners

v

Howard University, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE D.C. CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the lower court misapplied Rule 12(b)(6) of the Federal Rules of Civil Procedure when it dismissed Petitioners' complaint alleging an abuse of process when Respondent instigated and influenced a zoning procedure that radically devalued their property.

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OPINIONS BELOW

The opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is reprinted in Appendix A to this Petition. The prior opinion for the United States District Court for the District of Columbia is reprinted in Appendix B.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals for the District of Columbia was entered January 25, 1995. The Court of Appeals denied Petitioners' Petition for Rehearing on March 20, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

Amendment 5 to the United States Constitution:

"No person shall ... be deprived of life, liberty, or property without due process of law..."

Rule 12(b)(6) of the Federal Rules of Civil Procedure:

"Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader may be made by motion: ...(6) failure to state a claim upon which relief can be granted."

Rule 56(b) of the Federal Rules of Civil Procedure:

" A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof."

STATEMENT OF THE CASE

This case involves an alleged abuse of the D.C. zoning process. Petitioners were owners of land in Square 2882, in the 14th and U Street area of the District of Columbia ("D.C."). Respondent, Howard University, also owned property in this Square. As a result of the rezoning of their property from light industrial to residential, the Petitioners' property underwent a drastic reduction in value, and they were forced to sell it to Respondent. The Petitioners' subsequent complaint for abuse of process was dismissed by the District Court for the District of Columbia.

The District of Columbia Zoning Commission ("The Zoning Commission") undertook to rezone certain properties in the 14th and U Street area of D.C. This zoning case, numbered 87-7, did not include Square 2882 as it was originally established by the District of Columbia Office of Planning ("Office of Planning" or "OP"). The Office of

Planning is the central planning agency for the District responsible for the implementation of the Comprehensive Plan. D.C. Code Ann. §1-244(a) (1981). The Comprehensive Plan contains ten elements whose purposes were designed to develop many different aspects of life in the District of Columbia for the benefit of its residents including, but not limited to: promoting economic growth, maintaining and enhancing the natural and architectural assets of the District, and assisting in improvement of District neighborhoods and communities. D.C. Code Ann §1-245 (1981).

D.C. law limits the entities who may propose zoning changes to a piece of real estate to the property owner, the Zoning Commission, the National Capital Planning Commission, the Office of Planning, the Department of Housing and Community Development and other departments of the federal and District governments. D.C.

Mun. Regs. tit. 11, §102.2 (1987 ed..

Also intently interested in Case 87-7 was Respondent, Howard University, which also owned property in Square 2882. Under D.C. law, colleges and universities must prepare and submit a campus plan to the D.C. Board of Zoning Adjustment for its approval. Howard University's campus plan, approved in 1982, designated a part of Howard University's campus as being the "Howard University Gateway" area. The Howard University Gateway is adjacent to the east of the Office of Planning's 14th and U Streets study area. The plan set forth certain boundaries west of Georgia Avenue, in the Howard University Gateway area, and directed the University to concentrate its future development there. As a result, Respondent had an important incentive to acquire property in that area.

In 1987 and 1988, Howard University undertook to

update its Campus Plan. Consistent with the Board of Zoning Adjustment's directive in 1982, the 1988 Howard University Central Campus Plan proposed mixed university (institutional) uses west of Georgia Avenue including squares 2873, 2875 and 2977.

On June 10, 1988, by letter, Howard University asked the Office of Planning to include Squares 2873, 2875 and 2877 in its 14th and U Streets rezoning recommendations. On June 17, 1988, the Office of Planning declined the University's request citing the "significant delay" that such an addition to the case would cause. On July 5, 1988 the University formally asked the Zoning Commission to include Squares 2873, 2875 and 2877 within the scope of the Public Hearing Notice that would be issued in conjunction with Case No. 87-7. Subsequently, the Zoning Commission agreed to the University's request.

Thus far, the case did not include Square 2882. However, on August 3, 1988, the Office of Planning asked the Zoning Commission to add Squares 2882 and 2872 to the case. According to OP's memorandum, the Respondent met with the Office of Planning on August 1, 1988 to discuss the addition of supplementary squares to Zoning Case No. 87-7.

Apparently at that meeting, the Respondent asked the OP to add Square 2882 to the case. Respondent's counsel, Jerry Moore, at the Zoning Commission hearing of February 2, 1989 (which was held only to discuss the rezoning of the added squares including 2882) admitted that: "It's small because only six squares will be discussed tonight. These squares were added to the scope of the original case at the request of Howard University."

When the Petitioners later investigated the reasons why Square 2882 was added to Case 87-7, they discovered

through a Freedom of Information Act request that the OP had done no research or planning of any kind concerning the addition of Square 2882 to Case 87-7. In addition, in response to questioning by Petitioner Bernard Harrison, an agent of the Office of Planning told him that it was at Howard's request that the Square was added.

The Commission scheduled the expanded case, which included some 53 squares, for public hearing on September 29, 1988. In its notices to owners, the Commission advertised that Square 2882 might be rezoned from C-M-1 to CR, C-2-A and/or C-2-B (all being either industrial or commercial zoning). The notices made no mention of the possibility that Petitioners' property might be rezoned residential.

At the hearing, the Commission expanded the previously noticed zoning categories that it would consider for Square 2882. Square 2882 would be considered for "R-

4 and/or R-5-A through R-5-D [i.e. residential] zone districts... ." For the first time, the possibility of Petitioners' property being down zoned to residential status was raised. Petitioners had no prior warning that this change in case 87-7 might occur. The Commission also decided that it would schedule additional public hearings on the rezoning proposals in January and February 1989.

Subsequently, an amended Supplemental Public Notice was issued. That notice divided the testimony presentations to be given between "the OP and Howard University's proposals." The Respondent was given time to present testimony regarding Square 2882. The Office of Planning did no research or planning and thus presented no evidence regarding Square 2882 during the initial rezoning hearings for that Square. All of OP's duties concerning Square 2882 were performed by Respondent. Lindley Williams of the Zoning Commission stated for the record:

"When we set this case down in the beginning they [OP] indicated that they [OP] would -- and I'm going to characterize it -- substantially defer. In other words, they [OP] would let Howard do the work -- to this portion of the case."

At the hearings, the OP recommended R-5-C or R-5-D for lots on Square 2882 including Petitioners' property. Respondent recommended R-5-D zoning. Respondent's expert, Mr. Isham O. Baker, testified, "[If the Petitioners' property is zoned below R-5-D] ...I think it's unlikely that a developer is going to come in there and do anything."

On May 18, 1989, the Zoning Commission voted unanimously to rezone many of the squares within Case No. 87-7, including Plaintiffs' portion of Square 2882 which was designated to be rezoned as R-5-B. On November 13, 1989, the Zoning Commission issued final Order No. 632 which finalized the change of zoning on the Plaintiffs'

portion of Square 2882 from C-M-1 to R-5-B.

On June 8, 1990, the Petitioners filed a request asking the Zoning Commission to reopen the record and rehear Case No. 87-7 regarding the appropriate zone district classification for the Petitioners' property. The Petitioners claimed that the Commission denied them due process of law because the notices they had been given did not adequately alert them to the possibility that their property could be rezoned as residential. The Petitioners' request for rehearing detailed the various defective notices, conflicting statements and other irregularities occurring during the zoning case. By letter dated June 22, 1990, Respondent directed the Commission to maintain the zoning it had previously ordered and to deny the owners' request to reopen and rehear Case 87-7.

At its July 9, 1990 meeting, the Zoning Commission heard a staff determination that the Public Hearing Notice

relative to Squares 330, 2873 and 2882 may have been legally defective. The essence of the defect was that the original notice indicated that Petitioners' land was under consideration for the same zoning upgrade as most of the rest of the Respondent's property, namely from industrial to commercial. By some inexplicable behind the scenes process a down grading of Plaintiffs' property to residential became the subject of consideration. It was this secretive switch in zoning consideration for which legally sound notice was absent.

The Commission reopened the record with respect to the newly applied residential zoning on 2882. By letter dated July 27, 1990, the Respondent asked the Commission not to reopen the record.

At the rehearing, Respondent requested the Commission "to retain the R-5_B zoning that was determined as appropriate for those lots in Square 2882..."

Finally at this late stage in the process the OP began its own investigation into Square 2882. Just before the October 6th hearing, the OP filed a report recommending that the Petitioners' property be rezoned to C-2-B. Respondent responded by defending the zoning it had previously manipulated for Petitioners' property.

The Commission scheduled a decision on the rehearing at a meeting on January 24, 1991, which was later postponed until February 11, 1991. The Commission voted unanimously to retain the residential zoning on Square 2882 as originally ordered.

Before the zoning procedure had taken place, Petitioners had been given binding offers for their properties ranging up to $3,800,000. After the down zoning, Petitioners were unable to find any renters or buyers of their properties, except for Respondent. The Petitioners attempted to sell, rent or develop their properties for over a

year after the Zoning Commission's decision, during which time they paid tens of thousands of dollars in taxes and upkeep on the properties. Finally, in March 1992, Petitioners were forced to accept the Respondent's offer of $2,500,000 for the property.

With no other recourse, the Plaintiffs brought this diversity action in the District Court, asking for damages in the amount of the $1.5 million in lost property value plus expenses in maintaining the land and unsuccessfully defending the zoning process against the Respondent.

On October 8, 1993, the District Court granted the Respondent's motion to dismiss or in the alternative for summary judgment. On January 25, 1995, the Court of Appeals for the D.C. Circuit, without any opportunity for oral argument, upheld the District Court. On March 20, 1995, the Court of Appeals denied the Petitioner's Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

I. The District Court, as upheld by the Court of Appeals, Improperly Dismissed Petitioner's Abuse of Process Complaint

A. The Petitioners' Complaint Stated A Claim Upon Which Relief Could Be Granted

In dismissing the Petitioners' complaint, the District Court erred in two ways. First, it mischaracterized D.C. law as following a minority rule in Abuse of Process cases. Second, the court misread the Petitioners' complaint as simply alleging "an ulterior motive" on the part of Respondent. However, Petitioners have shown more than a motive; indeed, they have shown a true perversion of the process of zoning that, if left standing, raises due process concerns.

The Petitioners, in their complaint, alleged that the Respondent interfered with the D.C. zoning board and influenced them to rezone Petitioners' property in order to

cause it to lose value. As the result of meetings between the Respondent and the Office of Planning, the Petitioners' property first was added to Zoning Case 87-7 and then, suddenly and with no research done by the OP, was down-zoned from commercial to residential (even though the original notices did not mention any possibility of residential status). After being rezoned to residential status, the property became essentially worthless and the Petitioners were unable to rent or sell the property. At that point, with no alternative, Petitioners were forced to sell the land to Respondent at a price that was half of what they were offered before the rezoning.

A motion to dismiss for failure to state a cause should be granted when a complaint states no claim upon which relief can be granted. Rule 12(b)(6) Fed.R.Civ.Pro. "The complaint should not be dismissed unless it appears that appellant could 'prove no set of facts in support of his

claim which would entitle him to relief'" Jenkins v. McKeithan, 395 U.S. 411, 422 (1969), quoting Conley v. Gibson, 355 U.S. 41, 45-6 (1957). All facts alleged in the complaint and all reasonable inferences that can be drawn from them must be accepted as true. Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990).

As this is a diversity case, the District Court was obliged to apply state law. Erie Railroad v. Tompkins, 304 U.S. 64 (1938). The court purported to apply District law in dismissing the lawsuit, but it misinterpreted D.C. law by claiming that D.C. followed a minority rule in Abuse of Process cases. The court did not cite any case per se that announced a minority rule; instead it interpreted Bown v. Hamilton, 601 A.2d 1074 (D.C. 1992) and distinguished it from the Massachusetts case of Powers v. Leno, 509 N.E.2d 46 (Mass. App. Ct. 1987) to reach this conclusion.

Bown held that abuse of process occurs where a

legal "process has been used to accomplish some end which is without the regular purview of the process or which compels the party against whom it is used to do some collateral thing which he could not legally and regularly be required to do" and where there is a "perversion of the judicial process and achievement of some end not contemplated in the regular prosecution of the charge." Bown v. Hamilton, 601 A.2d 1074, 1078 (D.C. 1992), citing, Morowitz v. Marvel, 423 A.2d 196, 198 (D.C. 1980).

No where does Bown announce that the District of Columbia follows a minority rule in abuse of process cases. The above quoted description of the tort of Abuse of Process is not inconsistent with the case distinguished by the lower court, Powers v. Leno, 509 N.E.2d 46 (Mass. App. Ct. 1987) which allowed an abuse of process claim in similar circumstances. Just as Bown required a

"perversion" of the law in addition to a bad motivation, Powers stated that "bad intentions alone are not enough to impose liability" but there could be liability when there is "'a form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property.'" 509 N.E.2d at 48, quoting Prosser & Keeton, Torts, § 121 at 898 (1984).

Hence, the lower court invented a minority rule for the District of Columbia in order to distinguish a case allowing an abuse of process case to go forward when the zoning process was used to essentially extort a neighboring landowner.

The Court's misinterpretation of D.C. Law is also shown by a footnote in which the court distinguishes two federal cases from Bown. In Neuman v. Vidal, 710 F.2d 856 (D.C. Cir. 1983), an abuse of process was found in litigation initiated to discourage investment in a

competitor's business. In Whelan v. Abell, 953 F.2d 663 (D.C. Cir. 1992), an abuse was held to exist when litigation was initiated to coerce financial concessions from a business partner. Both cases are similar to the present case in that a legal process was utilized in order to gain an advantage in a business transaction, rather than for sound legal reasons.

The District Court held that the petitioners' case was deficient because they failed to show such a "perversion" of the process. Yet they have provided evidence that Howard instigated the rezoning of Square 2882. They have produced affidavits to show that without Howard that plot would never have been investigated. The Respondent's own agent admitted that the respondent was responsible for the inclusion of square 2882 in the case. D.C. law only allows the initiation of a zoning change by the owner of the property, the Zoning Commission, the OP and other agencies of the District and federal government D.C.

Mun. Regs. Tit. 11, §102.2 (1987). The Respondent's interest in rezoning Square 2882 could only have been to rezone Petitioners' property since, as a university, it is not bound by the zoning requirements. If it is true that the Respondent initiated the rezoning of Petitioner's property to lower its value, then a gross perversion of the law has occurred. The egregious nature of this perversion is shown by a consideration of this Court's rulings on the due process limits of zoning laws.

In State of Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928), the Supreme Court struck down a Seattle zoning ordinance that delegated zoning power to neighboring landowners. The court only a few years earlier had upheld the constitutionality of zoning laws, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), as the proper exercise of state police powers to be used to protect the public interest. However, the court

drew the line when the power to affect property was exercised by other property owners who may have selfish or arbitrary interests. Requiring the permission of neighbors was held to be "arbitrary and repugnant to the due process clause." Roberge, 278 U.S. at 123.

The D.C. zoning ordinance avoids the problems identified in Roberge by limiting those who can initiate and prosecute a zoning case to the Office of Planning, the owner of the property at issue, and other government agencies. However, if a private party can avoid these requirements by exerting its influence in an unofficial capacity, then exactly the problems identified by the Court in Roberge will be faced by a landowner who will be left without any remedy.

In a case in which there is no procedural irregularity from the point of view of the zoning authority, yet a private party exercises such undue influence, the only party against

whom a remedy can be useful is the private party. Appealing the zoning ruling or claiming a taking of property would be fruitless since all the "t"'s have been crossed and "i"'s dotted. Only by allowing a cause of action against the party who has improperly influenced the zoning board can an aggrieved party be given a meaningful remedy.

Although Respondent's influence was in an unofficial capacity, its alleged conduct creates the same harm identified in Roberge. Without the benefit of any discovery, the Petitioners have shown that Respondent initiated the rezoning of their property and then controlled that process, taking over the function of the Office of Planning.

While the normal property rights case usually involves a taking by the government, this important case illustrates how a government body can be used as a conduit to transfer property from one owner to another. "Hence it

is universally held that the taking of private property of one person for the private use of another violates the due process of law clauses of the Fifth and Fourteenth Amendments." Schneider v. District of Columbia, 117 F. Supp. 705, 716 (D.D.C 1953), aff'd, Berman v. Parker, 348 U.S. 98 (1954). See also, Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 241 (1984).

Here, the Respondent has taken a process designed to enhance the welfare of the entire community and corrupted it to achieve the collateral purpose of obtaining a neighboring property for itself by destroying its value. Clearly, the use of the zoning process to lower the value of a neighboring property is not an end contemplated by the D.C. zoning process. See, D.C. Code Ann., §5-424 (1994).

Thus, the Petitioners have shown that a perversion of D.C. law has occurred. The District Court in dismissing the complaint under Rule 12(b)(6) was bound to apply D.C.

law. Instead it made new local law by creating a minority rule for the jurisdiction to follow and strengthening the "perversion" criteria required to show an abuse of process. Under the normal, majority rule for the tort, an attempt to use a zoning procedure to extort and gain an advantage over a neighbor is sufficient.

B. Petitioners' Pleadings Showed that There Were Genuine Issues of Fact

Not only was dismissal under Rule 12(b)(6) improper but so too would be Summary Judgment under Rule 56. As argued above, a cause of action under D.C. law for abuse of process has been stated. Moreover, the Petitioners have shown enough evidence beyond the pleadings to survive summary judgment.

Summary judgment is proper when there are no genuine issues of material fact and, as a matter of law, the moving party is entitled to judgment. Anderson v. Liberty

Lobby, 477 U.S. 242 (1986). Celotex v. Catrett, 477 U.S. 316 (1986).

There are genuine issues of material fact. The Petitioners produced minutes from the public record where the Respondent's agent stated that Howard was solely responsible for instigating the abused process. The Petitioners have also pointed to meetings between the Respondent and the D.C zoning officials that resulted in sudden shifts in the position taken by the Office of Planning. Questions of fact remain as to Respondent's instigation and control of the zoning process and its motivations in so doing.

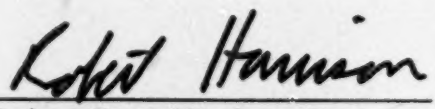
Thus, the Petitioners have produced sufficient evidence and pleadings to survive to trial. The Petitioners should be able to bring their case to trial. The Court of Appeals' sanction of the District Court's dismissal requires an exercise of the Supreme Court's power of supervision.

The judgment of the Court of Appeals should be reversed and the case should be remanded to the District Court for trial.

CONCLUSION

WHEREFORE, Petitioners respectfully pray that a writ of certiorari be granted.

Respectfully Submitted,



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